Supreme Court, U. S.
FILED
JAN 3 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. 77-940

HENRY A. SINGER,

Petitioner,

v.

DAVID GOLDBERG suing derivatively in right and for the benefit of UNIVERSAL GAS & OIL COMPANY, INC., YAACOV MERIDOR, MILA BRENER, ARA A. CAMBERE, H. STRUVE HENSEL, DAVID MERIDOR, S. ERELL, GIDEON BEN-AARON, HAIM RAFAELI, JACOB SUTTON, MARTIN SIEM, MARITIMECOR, S.A., MARITIME FRUIT CARRIERS COMPANY, LTD., and UNIVERSAL GAS & OIL COMPANY, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

J. JACK BROWN
110 East 59th Street
New York, New York 10022
Attorney for Petitioner
Henry A. Singer

Of Counsel:

JAY W. SEEMAN
ROBERT J. KAPLAN
SINGER HUTNER LEVINE & SEEMAN
110 East 59th Street
New York, New York 10022

INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes and Rule Involved	4
Statement of the Case	4
Reasons for Granting the Writ	8
Conclusion	17

TABLE OF AUTHORITIES

CASES:

Alabama Public Service Commission v. *Southern Railway*, 341 U.S. 341 (1951) 10

Blue Chip Stamps v. *Manor Drug Stores*, 421 U.S. 723 (1975) 8, 9, 10, 14

Burford v. *Sun Oil Company*, 319 U.S. 315 (1943) 10

Charney v. *Thomas*, 372 F.2d 97 (7th Cir. 1967) 15

Cort v. *Ash*, 422 U.S. 66 (1975) 7

Erie Railroad Co. v. *Tompkins*, 304 U.S. 64 (1938) 14

Greenspun v. *Lindley*, 44 A.D.2d 20, 352 N.Y.S.2d 633 (1st Dep't 1974), *aff'd* 36 N.Y.2d 473, 330 N.E.2d 79, 369 N.Y.S.2d 123 (1975) 12

Hausman v. *Buckley*, 299 F.2d 696 (2d Cir. 1962), *cert. denied*, 369 U.S. 885 (1962) 16

Langfelder v. *Universal Laboratories, Inc.*, 293 N.Y. 200, 56 N.E.2d 550 (1944) 12

Lauritzen v. *Larsen*, 345 U.S. 571 (1953) 16

McClure v. *Borne Chemical Co.*, 292 F.2d 824 (3d Cir. 1961), *cert. denied*, 368 U.S. 939 (1961) 13

PAGE

Piper v. *Chris-Craft Industries, Inc.*, 97 S. Ct. 926 (1977) 7
Santa Fe Industries, Inc. v. *Green*, 430 U.S. 462 (1977) 6, 7, 8, 10
Shaffer v. *Heitner*, 97 S. Ct. 2569 (1977) 16
Sternfeld v. *Toxaway Tanning Co.*, 290 N.Y. 294, 49 N.E.2d 145 (1943) 12
United States v. *Little Lake Misere Land Company*, 412 U.S. 580 (1973) 13, 15
Wallis v. *Pan American Petroleum Corp.*, 384 U.S. 63 (1966) 13, 15

STATUTES AND RULE:

Law of Panama Number 9 of July 2, 1946 16
N.Y. Bus. Corp. Law (BCL) § 627 (McKinney Supp. 1976-1977) 5, 13, 14
Rule 10b-5, 17 C.F.R. § 240.10b-5 (1977) 5
Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1970) 5, 6, 7, 8, 9, 10, 11, 13, 14
Section 9(e) of the Securities Exchange Act of 1934, 15 U.S.C. § 78i(e) (1970) 14
Section 18(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78r(a) (1970) 14
Title 28 United States Code § 1652 (1966) ..15, 16

INDEX TO APPENDIX

Opinion of the Court of Appeals for the Second Circuit 1a
Opinion of the District Court for the Southern District of New York 35a
Correcting Memorandum of the Opinion of the District Court for the Southern District of New York 45a
Denial of Petition for Rehearing 46a
Statutes and Rule Involved 47a

Supreme Court of the United States

OCTOBER TERM 1977

No.

HENRY A. SINGER,

Petitioner,

v.

DAVID GOLDBERG suing derivatively in right and for the benefit of UNIVERSAL GAS & OIL COMPANY, INC., YAACOV MERIDOR, MILA BRENER, ARA A. CAMBERE, H. STRUVE HENSEL, DAVID MERIDOR, S. ERELL, GIDEON BEN-AARON, HAIM RAFAELI, JACOB SUTTON, MARTIN SIEM, MARITIMECOR, S.A., MARITIME FRUIT CARRIERS COMPANY, LTD., and UNIVERSAL GAS & OIL COMPANY, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner respectfully prays that a Writ of Certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Second Circuit entered in these proceedings on September 8, 1977.

A Petition bearing docket number 77-897 filed on December 22, 1977 by Messrs. Brener and Y. Meridor, other defendants-appellees below, seeks the same relief as is sought in this petition and raises some, but not all, of the questions presented herein.

OPINIONS BELOW

The Opinion of the Court of Appeals reversing the decision of the District Court and remanding the case is reported at ____ F.2d ____ (2d Cir. 1977) and is printed in the Appendix hereto (la *et seq.*). The Opinion of the District Court and Correcting Memorandum dismissing the Amended Complaint is reported at 426 F. Supp. 1059 (S.D.N.Y. 1977) and is printed in the Appendix hereto (35a *et seq.*).

JURISDICTION

The Judgment of the Court of Appeals was entered on September 8, 1977. A timely Petition for Rehearing was denied on October 21, 1977 (46a), and this Petition for a Writ of Certiorari was filed within 90 days of that date. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

A minority stockholder ("Goldberg") of a Panamanian corporation ("UGO") instituted a derivative action against all of the directors of UGO and its Panamanian parent ("MARITIMECOR"), alleging their knowing authorization of and participation in various unfair and wasteful transactions, including an unconsummated agreement by UGO to issue an undetermined number of its shares to MARITIMECOR in exchange for all of MARITIMECOR's assets and liabilities. No stockholder approval of these transactions was needed or sought. Although the gravamen of Goldberg's claim in his original and amended complaints was common law breach of fiduciary duty and unfairness, in order to avoid New York State's security-for-costs statute (BCL § 627), the Amended Complaint purportedly abandoned non-federal claims and asserted federal

jurisdiction under Section 10(b) of the Securities Exchange Act of 1934. It sought an injunction, damages and other relief. Goldberg's Amended Complaint did not allege any material/causal deception, or that he was a purchaser or seller of securities. However, on defendants' motion to dismiss the Amended Complaint for failure to state a claim, Goldberg offered to further amend his pleadings to allege that UGO's minority shareholders had been misled by inadequate disclosure. The motion to dismiss was granted and leave to again amend was denied.

1. In the foregoing context, are the purchaser-seller and material/causal deception requirements of Section 10(b) satisfied by either of the following allegations:

(a) That, had sufficient disclosure been made to UGO's minority shareholders of the agreement between UGO and its parent, those minority shareholders could have obtained a New York State injunction against consummation of the agreement;

(b) That, had sufficient disclosure been made, a fictional, independent Board of Directors, composed of reasonable men, would not have authorized the agreement between UGO and its parent, although the agreement was, in fact, authorized by UGO's real Board of Directors, who had full knowledge of the facts.

2. In the foregoing context, is it an abuse of discretion for a District Court, by denying leave to further amend a complaint, to decline to hear a complaint which, at best, after amendment, would involve only a "marginal" federal interest, and in which important issues of non-federal law would first have to be determined as a prelude to granting federal relief?

3. Do 28 U.S.C. § 1652 (State Laws as Rules of Decision in U.S. Courts) and/or this Court's decisions

make state security for costs and expenses statutes applicable to cases brought under the "federal common law" of Section 10(b)?

4. In this derivative action, instituted by a Floridian stockholder of a Panamanian corporation in a New York Federal Court, alleging a violation of Section 10(b) by means of an unfair transaction between a Panamanian corporation and its Panamanian parent, do federal choice of law rules require that Panamanian law be applied to determine whether a minority stockholder may sue derivatively?

STATUTES AND RULE INVOLVED

Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5; Section 9(e) of the Securities Exchange Act of 1934, 15 U.S.C. § 78i(e); Section 18(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78r(a); 28 U.S.C. § 1652, and New York Business Corporation Law (BCL) § 627 are set forth in the Appendix hereto (47a *et seq.*).

STATEMENT OF THE CASE

This is a minority stockholders' derivative action instituted by David Goldberg, a Floridian, in the United States District Court for the Southern District of New York on behalf of Universal Gas & Oil Company, Inc. ("UGO"), a Panamanian corporation. The original Complaint sought an injunction, damages and other relief against UGO's controlling parent, Maritimecor, S.A. ("MARITIMECOR"), also a Panamanian corporation, MARITIMECOR's own parent, Maritime Fruit Carriers Company, Ltd., an Israeli corporation, and all of UGO's directors and officers, most of whom are citizens and residents of countries other than the United States.

The original Complaint charged that the defendants, including all of UGO's directors, caused UGO to enter into transactions which had no business purpose, were of no benefit to UGO, represented self dealing, and constituted breaches of fiduciary duty owed to UGO. It was further alleged that the wrongful actions culminated in an agreement by which UGO was to issue to its parent MARITIMECOR not more than 4,200,000 shares of UGO's common stock in exchange for all of MARITIMECOR's assets and liabilities, except for certain UGO shares already owned by MARITIMECOR ("MARITIMECOR/UGO transaction"). According to Goldberg, the foregoing constituted a violation of Section 10(b) of the Securities Exchange Act of 1934, and Rule 10b-5 issued pursuant thereto, as well as a violation of Common Law.

Pursuant to New York Business Corporation Law (BCL) § 627, UGO, the nominal defendant, moved that Goldberg be required to post adequate security for costs and expenses, or have his Complaint dismissed. The District Court granted this motion, unless Goldberg either amended his Complaint to eliminate all non-federal claims, or established that he was exempt from posting such security. Goldberg, whom the District Court subsequently found could not post security (43a) amended his Complaint in an effort to avoid its dismissal. However, except for minor cosmetic changes intended to eliminate all direct references to non-federal law, and the addition of a host of other defendants, the Amended Complaint contained the same allegations as had the original Complaint, all of which Goldberg now alleged constituted violations of Section 10(b).

Since the Amended Complaint contained no meaningful allegations of deception, materiality, or causation, the majority of the defendants, joined by UGO, filed motions to dismiss for failure to state a claim.

In opposition to the motion, Goldberg insisted that deception was not necessary. Alternatively, Goldberg's counsel sought leave to further amend the Amended Complaint to allege that there had been deception of the minority shareholders. Specifically, he asserted that two press releases issued by UGO describing the MARITIMECOR/UGO transaction constituted inadequate disclosure because they failed to disclose (a) facts which indicated that the MARITIMECOR/UGO transaction would be unfair to UGO; and (b) the conflict of interest between UGO and MARITIMECOR.

Concluding that deception was and had always been an indispensable element of a Section 10(b) claim, the District Court, Lasker, J., granted the motions to dismiss the Amended Complaint. He also denied leave to amend on the grounds that

> "[t]here is a limit to the time and energy a federal court should accord to marginal federal causes of action which are fully capable of being vindicated in state court. Presumably, if the element of deceit formed any significant aspect of Goldberg's claim, or was responsible for the alleged injury to UGO, Goldberg could have been expected to have plead such facts before the third go-round." (43a-44a)

Judge Lasker subsequently issued a "Correcting Memorandum" pointing out that the Supreme Court's recent decision in *Sante Fe Industries, Inc.* v. *Green,* 430 U.S. 462 (1977) supported his earlier decision.

In apparent confirmation of Judge Lasker's view that his claim was essentially a state law claim, Goldberg subsequently brought an action in New York State Supreme Court, which is still pending. The complaint therein makes substantially the same allegations as those contained in this case.

Nevertheless, the Court of Appeals for the Second Circuit, in a panel composed of Judges Friendly, Timbers

and Meskill, *reversed,* finding that the court below should have given Goldberg a further opportunity to amend his pleadings. The majority also found that the Amended Complaint could be satisfactorily amended to include causal/material deception of UGO, by alleging insufficient disclosure to its minority stockholders of the MARITIMECOR/UGO agreement, although all the directors of UGO allegedly knew and participated in the acts complained of, and although no stockholders' approval of the MARITIMECOR/UGO transaction was required or sought.

The majority reasoned that if full disclosure of the allegedly unfair terms of the MARITIMECOR/UGO transaction had been made to UGO's minority stockholders, such stockholders could have instituted a derivative action in New York State court and obtained an injunction to stop consummation of the transaction.

The majority further reasoned that if full disclosure had been made, a fictional, independent UGO Board of Directors, composed of reasonable men, would have refused to authorize the MARITIMECOR/UGO agreement, although UGO's real board did do so.

Dissenting in part, Judge Meskill stated that the decision of the majority was in conflict with this Court's recent decisions in *Sante Fe Industries, Inc.* v. *Green,* 430 U.S. 462 (1977); *Piper* v. *Chris-Craft Industries, Inc.,* 97 S. Ct. 926 (1977); and *Cort* v. *Ash,* 422 U.S. 66 (1975). He noted that under the majority's reasoning a cause of action under Section 10(b) would arise whenever controlling shareholders or directors failed to disclose their breach of fiduciary duty and a security was in some way involved. He further asserted that it was improper to premise a federal cause of action upon the availability of a hypothetical New York injunction, especially when it was unclear as to whether such an injunction was, in fact, available and when difficult choice of law issues were present. Moreover, he was concerned that the existence

of federal rights would depend on venue and non-federal law, since the courts of some jurisdictions might grant an injunction while others would not. In these circumstances, Judge Meskill asserted that the plaintiff be left to the State courts in which he already had a suit pending.

REASONS FOR GRANTING THE WRIT

QUESTION 1

THE DECISION BELOW CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT

With respect to the requirement of deception, the Second Circuit's decision is in conflict with this Court's teaching in *Santa Fe Industries, Inc.* v. *Green,* 430 U. S. 462 (1977). If permitted to stand, the circuit court's decision will open the doors of the federal courts to substantially all corporate mismanagement cases in which a security is somehow involved. This would be in direct violation of the spirit, if not the letter, of *Santa Fe.*

If "deception" is construed, as the court below has construed it, to include a deception which might affect hypothetical directors, or which might influence minority stockholders to seek hypothetical injunctions which they have not sought and which are not available in the real world, then the deception requirement of *Santa Fe* will have no practical meaning.

As pointed out by the dissenting opinion in the court below, if failure to disclose to minority shareholders the unfairness of a transaction or possible breaches of fiduciary duty can convert a non-federal common law claim into a federal one under Section 10(b), then this court's admonitions that Section 10(b) is not designed to create a national law of corporations will have to be retracted.

The decision below is also in conflict with the purchaser-seller requirements laid down by this Court in *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U. S. 723 (1975).

Goldberg was neither a purchaser nor a seller of the securities involved here. Neither he nor any minority stockholder of UGO had any investment decision to make. The law of Panama, which was the place of incorporation of both UGO and MARITIMECOR, did not require shareholder approval of either the agreement which is attacked, or its consummation. Only UGO and its parent MARITIMECOR were seller and purchaser and only their respective boards of directors had to make investment decisions.

The decision below is in conflict with the decision in *Blue Chip Stamps* for yet another reason. In that case this Court found that an allegation of deception leading to *in*activity did not satisfy the pleading requirements of Section 10(b). In this case, however, the majority of the court below found sufficient a claim that UGO's minority shareholders were lulled into not seeking and obtaining a New York State court injunction because of an alleged deception. If an allegation of deception leading to inactivity in the purchase or sale of stock is insufficient, so too is pleading inactivity in seeking and obtaining an injunction. Both of these allegations involve "issues of fact" which are difficult to prove or disprove, thereby increasing the risk of "strike" suits, something which this Court condemned in *Blue Chip Stamps, supra.*

The foregoing issues have been dealt with more extensively in the petition filed under docket no. 77-897 by Messrs. Meridor and Brener, co-defendants-appellees in the action below, and the petitioner herein respectfully refers the Court to that petition for further exposition of the foregoing points.

QUESTION 2

A. THE COURT BELOW DECIDED AN IMPORTANT QUESTION OF STATE LAW IN A MANNER INCONSISTENT WITH THE DECISIONS OF THE HIGHEST COURT OF THE STATE OF NEW YORK

B. THE DECISIONS BELOW PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT, TO WIT: MAY A DISTRICT COURT DECLINE TO HEAR A COMPLAINT WHEN IT IS COUCHED IN THE LANGUAGE OF §10(b) BUT IS ESSENTIALLY A NON-FEDERAL CLAIM

Viewed from one perspective both the District Court and Judge Meskill recognized that it might be possible for Goldberg to plead a "slight" or "marginal" federal cause of action. Even so, both felt that it would be more appropriate for the federal court to stay its hand and to allow the appropriate state court to deal with this case, particularly since Goldberg had an action parallelling the instant one pending in New York State Court. In reversing Judge Lasker, the majority below apparently held that, so long as a federal cause of action could be "stated", the case could not be dismissed. In taking this mechanistic view, the Second Circuit paid insufficient attention to the doctrine of "abstention" recognized by this Court.

Abstention in favor of State Court proceedings may be proper even if federal jurisdiction is premised on a "federal" question. *See, Burford* v. *Sun Oil Company,* 319 U.S. 315 (1943); *Alabama Public Service Commission* v. *Southern Railway,* 341 U.S. 341 (1951). The scope of discretion in deciding whether to hear "federal" claims should be even greater in Section 10(b) actions, since such actions are, by their very nature, creatures of judicial implication and policy considerations. *See, Blue Chip Stamps* and *Santa Fe, supra.* The particular facts of this case present an ideal opportunity for this Court to settle the question of whether a federal court has discretion to decline to hear a claim asserted under Section 10(b), if it appears that such claim is best left to the state courts. See, Part IV of *Santa Fe, supra.*

In foreclosing Goldberg's right to re-amend his Complaint, Judge Lasker not only decided that the Complaint, as first amended, failed to state a federal cause of action, but also held that this case did not properly belong in a federal court, no matter how artfully re-pleaded.* Ironically, the grounds used by the Second Circuit to reverse Judge Lasker confirm his view of the case, since even that Court could only find a "federal" claim by resort to New York's law of injunctions.

Predicating a Section 10(b) claim upon the alleged loss of a state court injunction involves the federal judiciary in an improper investigation into the psychology of a hypothetical state court. It is an area from which a federal court should properly abstain. In addition to deciding whether an injunction is available as a matter of state choice of law rules and substantive law, the court must also indulge in speculation as to whether, under the facts of a particular case, a state court judge using his equitable discretion would have granted injunctive relief. In addition, the federal court is called upon to speculate as to the amount of a bond that a state court would have imposed upon the person seeking such an injunction, as well as to whether such person would have been able to actually post such a bond. Moreover, in a derivative action such as this one, the court must further engage in conjecture as to whether a representative stockholder would have been able to satisfy applicable state security-for-costs provisions.** Finally, the court would

*Judge Lasker recognized that the existence of federal rights should not depend upon the semantic versatility of a plaintiff's counsel. Use of the term "fraudulent" in place of "unfair" should not convert a common law claim into one under Section 10(b) (41a-42a). The accuracy of this observation was highlighted when the majority of the Second Circuit, in a subsequent order, modified its original opinion by substituting the words "a fraudulent" for the words "an unfair" (46a).

**In this case this was not speculation, since the District Court found that Goldberg could not do so (43a), a finding not controverted by the Court of Appeals majority.

have to speculate about how a state court might consider other equitable factors such as laches.*

The Second Circuit's decision not to abstain in this case is unsound for yet another reason—it's holding is in direct contradiction to existing New York law. Whatever the availability of injunctive relief in cases involving domestic New York corporations (see Footnote 7 of the opinion of Meskill, J. (30a)), New York law is clear that New York courts will not issue injunctions, and will not even take jurisdiction, in cases involving the "internal affairs" of a foreign corporation, even if that corporation has a substantial presence in New York. *See, Sternfeld* v. *Toxaway Tanning Co.*, 290 N.Y. 294, 49 N.E.2d 145 (1943); *Langfelder* v. *Universal Laboratories, Inc.*, 293 N.Y. 200, 56 N.E.2d 550 (1944); *Greenspun* v. *Lindley*, 44 A.D.2d 20, 352 N.Y.S.2d 633 (1st Dep't 1974), *aff'd*, 36 N.Y.2d 473, 330 N.E.2d 79, 369 N.Y.S.2d 123 (1975). Given the weight that opinions of the Second Circuit have in New York State courts (not to mention the controlling nature of their decisions on District Courts in New York State), its incorrect holding that an injunction was available under New York law in this case creates a wholly unnecessary confusion as to the status of New York State law, as regards both its choice of law rules and its law of injunctions. Accordingly, that holding should not be allowed to stand.

---

*In this case this too did not require speculation, since Goldberg is obviously guilty of laches, having thus far failed to seek his "lost" injunction in state court, although he has an action pending there and although UGO has yet to issue any stock to its parent.

QUESTION 3

THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT, TO WIT: THE EXTENT TO WHICH STATE LAW (IN PARTICULAR STATE SECURITY-FOR-COSTS PROVISIONS) IS APPLICABLE TO CASES BROUGHT UNDER SECTION 10(b)

The District Court found that Goldberg could not satisfy BCL § 627, which requires a minority stockholder like Goldberg, suing derivatively, to post security for costs and expenses (49a-50a), a finding that has never been challenged. Accordingly, if BCL § 627 is applicable to "federal common law" cases such as this one, then Goldberg's complaint was properly dismissed, however he might have amended it.

This Court has never ruled on whether relevant state security-for-costs provisions are applicable to derivative actions brought under Section 10(b), which, as creatures of judicial implication, are prime examples of "federal common law". While in *McClure* v. *Borne Chemical Co.*, 292 F.2d 824 (3d Cir. 1961), *cert. denied*, 368 U.S. 939 (1961) the Third Circuit asserted that such state provisions did not apply, that decision is incompatible with this Court's decision in *Wallis* v. *Pan American Petroleum Corp.*, 384 U.S. 63 (1966) some five years later. In *Wallis* this Court held that, unless application of state law posed a "significant threat" to federal policy, "federal common law" divergent from state law should not be adopted. The decision in *McClure* is also inconsistent with the more recent holding in *United States* v. *Little Lake Misere Land Company*, 412 U.S. 580 (1973), in which this Court held that, in forming federal common law, the federal courts would "borrow" state law, especially if such state law "served legitimate and important state interests", unless such state law was "plainly hostile" to federal interests.

State security-for-costs provisions are designed to prevent "strike" suits. This Court has recognized that the threat of "strike" suits is particularly real in Section 10(b) actions, and is not desirable. Elimination of "strike" suits is one consideration in drawing the parameters of the judicially implied cause of action under Section 10(b). *See, Blue Chip Stamps, supra.* Thus, not only is the policy underlying BCL § 627 not hostile to federal policy, but the legislative policy of New York State is in accord with one espoused by this Court. Applying BCL § 627 to the "federal" claims asserted by Goldberg in the Amended Complaint would, therefore, pose no "significant threat" to federal policy. Moreover, other sections of the Securities Exchange Act of 1934 expressly provide for security for *defendant's* costs. *See* Sections 9(e) and 18(a) thereof (48a-49a). If security for defendant's costs is part of express federal policy, then *a fortiori* security for the costs of UGO, the real *plaintiff*, cannot be contrary to federal public policy.

To a significant extent, the attempts of plaintiffs in derivative actions to fit the "square peg" of a state law claim into the "round hole" of Section 10(b) (of which this case is a prime example) are motivated by a desire to avoid state security-for-costs provisions. In such cases, a federal forum has been chosen not because a "federal" right is being vindicated, but because, tactically speaking, a federal forum is desirable since it supposedly has no security-for-costs provisions.* Forum shopping of this kind is just as damaging to the integrity of the judicial system as that condemned by this Court in *Erie Railroad Co.* v. *Tompkins,* 304 U.S. 64 (1938). Moreover, the waste of federal judicial resources in dealing with such pseudo-federal claims is thoroughly unjustified. There is no reason why revelant state security-for-costs provisions

---

**See,* Jennings and Marsh, *Securities Regulation,* (3d. ed.) at p. 1223.

should not be applied in different federal forums, just as different state statutes of limitations are applied in the federal courts in Section 10(b) cases. *See, Charney* v. *Thomas,* 372 F.2d 97 (7th Cir. 1967). In such event, derivative plaintiffs will not seek to seduce the federal courts into taking their cases through ever more imaginative theories and pleadings.

In addition to this Court's holdings in *Wallis* and *Little Lake, supra*, 28 U.S.C. § 1652 mandates that

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

There is nothing in the Securities Exchange Act of 1934, or its legislative history, which indicates that Congress meant to exempt cases brought under that Act from state security-for-costs laws. On the contrary, as noted above, Federal and State policies in this area are in substantial accord.

QUESTION 4

THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT, TO WIT: SHOULD FOREIGN LAW BE APPLIED TO SECTION 10(b) CASES OF INTERNATIONAL DIMENSIONS

The Court of Appeals impliedly recognized that a choice of law issue was presented in this case; *i.e.*, whether Panamanian law applies and whether that law denies Goldberg standing to sue derivatively on UGO's behalf. The majority suggested that it might have decided the case differently had it been shown that Goldberg's derivative mode of action was unavailable

under Panamanian law, citing to its decision in *Hausman* v. *Buckley*, 299 F.2d 696 (2d Cir. 1969), *cert. denied*, 369 U.S. 885 (1962) (23a). Although the petitioner and others addressed themselves to these questions in their petition for rehearing, the Second Circuit nevertheless declined to grant a rehearing (Meskill, J. dissenting (46a)).

Under federal choice of law rules, Panamanian law applies. The parties to the transactions complained of by Goldberg are two Panamanian corporations. Accordingly, Panama has the paramount interest in this case, and its law should be applied to this matter. *See*, *Lauritzen* v. *Larsen*, 345 U.S. 571 (1952). In addition, this transaction, involving as it does the "internal affairs" of Panamanian corporations, is governed by the law of Panama. *See*, *Shaffer* v. *Heitner*, 97 S.Ct. 2569, 2586 at n.44 (1977). Under law Number 9 of the Republic of Panama, the derivative mode of action is unknown; consequently, Goldberg's claim would have to be dismissed. This result is not contrary to public policy. *See*, *Hausman* v. *Buckley*, *supra*.

CONCLUSION

As the discussion above indicates, the decision of the Second Circuit is incompatible with several decisions of this Court. In addition, the holding of the Court of Appeals is in direct conflict with the law of the State of New York, which law formed the principle basis for the Second Circuit's decision. Moreover, the issues in this case which involve forum shopping, as well as the applicability of 28 U.S.C. § 1652 to "federal common law", pose important and complex questions of federal law which demand the attention of this Court. Finally, by refusing to give heed to applicable federal choice of law rules and by failing to give due recognition to the applicability of the doctrine of "abstention" to the facts of this case, the Second Circuit erred and should be reversed by this Court.

Respectfully submitted,

J. JACK BROWN
110 East 59th Street
New York, New York 10022
Attorney for Petitioner
Henry A. Singer

Of Counsel

JAY W. SEEMAN
ROBERT J. KAPLAN
Singer Hutner Levine & Seeman
110 East 59th Street
New York, New York 10022